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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.157 of 2002

APPELLANT	Ramlal, s/o Amar Sai, aged about 30 years, r/o Village Banji, Police Station Manendragarh, Distt. Korea (C.G)
	Versus
RESPONDENT	State of Chhattisgarh, Police Station Incharge Pondi, Distt. Korea

Appeal u/s 374(2) of the Code of Criminal Procedure

Appearance:

Smt. Usha Chandrakar, counsel for the appellant.

Shri Ravindra Agrawal, Panel Lawyer, for the State.

ORAL JUDGMENT

(19.7.2007)

Sunil Kumar Sinha, J,

(1) Heard.

(2) This appeal is directed against the judgment of conviction and order of sentence dated 18.01.2002 passed by the Addl. Sessions Judge, Manendragarh, District Korea, in Sessions Trial No.236/2000, whereby the appellant was convicted u/ss 366 & 376 I.P.C., and sentenced to undergo R.I. for 3 years and to pay a fine of Rs.500/-, in default of payment of fine, to further undergo additional imprisonment for 3 months & R.I. for 7 years and to pay a fine of Rs.500/-, in default of payment of fine, to undergo additional imprisonment for 3 months with a further direction to run the sentences concurrently.

(3) The brief facts are that 4-5 months prior to the present incident the prosecutrix was allegedly taken by this appellant on an earlier occasion and she resided in his house for about one month, for which the appellant was prosecuted u/ss 363, 366 & 376 IPC vide Sessions Trial No.410/1999 and was acquitted by the

Sessions Court. The allegations are that later on, on second time on 07.1.2000 he again took the prosecutrix while she was returning back from the forest alongwith her mother. She remained in the house of the appellant for a night and in the next morning a written report was lodged by the father of the prosecutrix in the concerned Police Station vide Ex.P.1. On the said report, the girl was recovered from the house of the appellant and she made the allegations that she was subjected to forcible sexual intercourse by the appellant in the night in his house. On such allegations, again an offence u/ss 341, 294, 506(part-ii), 342, 363, 366, 368 & 376 (2)(f) of I.P.C. was registered through Crime No.3/2000 vide Ex.P.10. Prior to that, a *Dehati Nalishi* Ex.P.9 was also recorded on 08.1.2000. During the course of investigation, the prosecutrix was sent for medical examination and was examined by Dr.(Smt.) Seema Chainpuria (P.W.5) who prepared her report Ex.P.4, according to which, there were no external injuries on the person of the prosecutrix. She was undergoing menstruation period, there were no injuries on the vagina, but her hymen was ruptured. No reddishness, tenderness etc., were noticed and she was found habitual to sexual intercourse. She had prepared two slides from the vaginal material which were sent for chemical examination. The chemical examiner's report Ex.P.14 was received, according to which, semen stains and human spermatozoa were found in the slides prepared from the vaginal material and the same materials were also found on the petty-coat seized from the possession of the prosecutrix. After due investigation, the charge sheet was filed. According to the prosecution, the girl was said to be minor on the date of incident.

(4) On trial, the Sessions Judge recorded a finding vide Para 7 of the Judgment that she was aged in between 18 and 20 years but he also recorded the finding that she was forcibly taken by the appellant from the guardianship and possession of her mother and was subjected to forcibly sexual intercourse by him.

(5) Learned counsel for the appellant argues that according the evidence of the prosecutrix, the matter appears to be one of consent. She argues that in view of the conduct of the prosecutrix the Sessions Court erred in law in holding the appellant guilty of the aforesaid offences.

(6) On the other hand, learned state counsel opposes these arguments and supported the judgment of conviction and order of sentence passed by the Sessions Court.

(7) I have heard learned counsel for the parties and have also gone through the records of the Sessions Trial.

(8) It is an admitted position in the case that the appellant and the prosecutrix both are residents of same village and earlier to the present incident, the prosecutrix was allegedly taken by the appellant from her house and she resided with him for about a month for which an earlier crime was registered against the appellant and he was acquitted of the charges framed u/ss 363, 366 & 376 IPC vide Sessions Trial No.410/1999. For the second occasion (present one), the prosecutrix Ku. Saraswati (P.W.1) deposed that on the fateful day when she was returning from the forest alongwith her mother after collecting wood, the appellant met on the way and caught hold of her saying that because of her, he had remained in jail for 4 months, therefore, he will ruin her and saying this he took her to his house. At that time, the other family members of the appellant were also there in his house. She stated that she was locked in a room and in the night she was subjected to sexual intercourse by the appellant. She was released when the police came there in the next morning. Vide para 10 of her cross-examination though she has denied that she had gone with him on her own will but she stated that the appellant had caught hold of her hand and had taken her with him, but she was not dragged by him and had gone with him on foot. Vide Para 11 of her cross examination, she has further admitted that the facts regarding the threat given by the appellant that he will ruin her,

was told to the police but if it is not there in the police statement Ex.D-1, she cannot tell the reasons for the same.

(9) The father of the prosecutrix namely Ram Singh has been examined as P.W.2 but he has not deposed much more about the incident and his evidence is also shaky on the point of lodging of the report because on his own instance, he did not say anything about it but when he was re-examined by the Court, later on, he admitted about lodging of report in Police Station vide Ex.P.1.

(10) Pavitravati, who is the mother of the prosecutrix, has also been examined as P.W.3. She has also deposed almost in similar fashion as has been deposed by the prosecutrix. In the cross examination vide Para 9 when she was faced with the omission in her police statement Ex.D-2 regarding the allegations that the appellant was saying that he will ruin the prosecutrix, she stated that she cannot tell why these facts are not mentioned there.

(11) The most interesting deposition is made by elder brother of the prosecutrix namely Man Singh (P.W.6). His entire examination in chief is reproduced as under:

> "मेरी छोटी बहन सरस्वती रामलाल के घर अपने मन से चली गई थी । हम लोग उसे रामलाल के घर से लाते थी लेकिन फिर वह वहीं चली जाती थी । मेरी बहन एक माह अभियुक्त के घर रही थी उसके बाद थाने मे रिपोर्ट कर दिये ।"

This witness has not been declared as hostile, nor there is any cross examination by the prosecution regarding the deposition made by him. The said evidence of this witness, who is the real brother of the prosecutrix, goes to suggest that in fact, there were old relations between the appellant and the prosecutrix and the prosecutrix used to go and reside in the house of the appellant and she was brought from his house on many occasions by her family members. The evidence of this witness is relevant to show the conduct of the prosecutrix.

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(12) On appreciation of the evidence led by all these witnesses, particularly, in the back ground that on earlier occasion also the prosecutrix had gone with the appellant and had resided in his house for about a month, for which the appellant was prosecuted and later on acquitted and also in light of the evidence of real brother of the prosecutrix, it can be easily inferred that the relations between the parties were old and in the facts and circumstances of this case, a possibility of the prosecutrix being a consenting party on this occasion, has not been fully ruled out by the prosecution. The evidence of the mother as well as the prosecutrix in which they have stated that she was forcibly taken by the appellant from the place of occurrence, i.e. the way to their house from the forest, appears to be unreliable as the same were omissions in their police statements which were faced by the defence during the course of their cross examination.

(13) In view of the above facts and circumstances and also in view of the finding of age recorded by the Sessions Court, according to which, she was in between 18 and 20 years of age, in the opinion of this Court, the trial Court erred in law in holding that either it was a case of kidnapping or abducting or a case of rape as envisaged under section 366 or 376 of I.P.C. In view of the above, the conviction and sentence awarded to the appellant cannot be sustained.

(14) In the result, the appeal is allowed. The conviction and sentences awarded to the appellant are set aside. The appellant is acquitted of the charges framed against him.

Sd/-
Sunil Kumar Sinha
Judge

Rao